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No. 97-282

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BETH ANN FARAGHER,
Petitioner,
v.
THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICUS CURIAE OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF THE RESPONDENT

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BRIEF AMICUS CURIAE OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF THE RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

The Society for Human Resource Management (SHRM) is the leading voice of the human resource profession. SHRM, which celebrates its 50th anniversary in 1998, provides education and information services, conferences and seminars, government and media representation, on-

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No persons or entities other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

line services and publications to more than 90,000 professional and student members throughout the world. As the world's largest human resource management association, SHRM is a founding member of the North American Human Resource Management Association and a founding member and Secretariat of the World Federation of Personnel Management Associations.

As the major association of the human resources profession, SHRM and its members are vitally concerned with the orderly development of the law defining, in practical terms, the meaning of non-discrimination and equal employment opportunity and, more specifically, the nature and scope of an employer's obligation to provide a workplace free from sexual harassment. SHRM has long recognized its special responsibility to support and encourage compliance with fundamental principles of equal employment opportunity in the administration of efficient, workable personnel management systems.

With respect to this case, SHRM's interest is to protect its members by supporting rules that encourage employers to initiate and maintain, and employees to use, procedures that address sexual harassment complaints. SHRM offers its members written guidance, such as advisory papers entitled "Minimizing Workplace Sexual Harassment: A Preventative Strategy" and "Resolving Sexual Harassment Disputes Through Mediation" and white papers on landmark court decisions that address sexual harassment. SHRM also provides training to its members in annual conferences. At the 1997 conference, a presentation was made to SHRM members entitled "Proactive Measures in Sexual Harassment and Discrimination for the Litigation-Averse". These measures are designed by SHRM to teach and motivate employers to develop anti-harassment policies and procedures that will encourage employees to report harassment in the workplace.

Conversely, the rules that Petitioner suggests that the Court adopt in this case would encourage employees to bypass internally established mechanisms and prematurely seek judicial redress for most acts of alleged harassment by supervisors. Therefore, SHRM submits this brief to further its goal of promoting management policies that foster the efficient internal resolution of employment disputes.

INTRODUCTION

In its landmark decision in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986), this Court noted that employers can substantially reduce the likelihood of incurring liability for sexual harassment by establishing procedures "calculated to encourage victims of harassment to come forward." Four years later, the United States Equal Employment Opportunity Commission (EEOC) explained that, to accomplish this end, employers should establish an explicit and regularly communicated policy that prohibits harassment, sets forth sanctions for harassment, establishes procedures to address harassment complaints and ensures that complaints will be addressed confidentially to the extent practical and with protection from retaliation.[2]

This advice has not gone unheeded by corporate America. In fact, recent surveys have revealed that an overwhelming majority of employers have promulgated formal policies addressing the issue of sexual harassment in the workplace.[3] Also, consistent with the language in

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[2] EEOC Compliance Manual (CCH) ¶ 3114, at 3282 (Mar. 19, 1990). (To facilitate the Court's complete understanding of the terms of an anti-harassment policy, a sample is attached as an Appendix.)

[3] Sherwood Ross, *Closing the Door on Harassment*, Newsday, July 13, 1997, at F10 (A study by the American Management Association found that 89 percent of its member companies have formal "no harassment" policies.); Lynne Curry-Swann, *Do I Need A Priest, A Lawyer, Or What?*, Anchorage Daily News, Feb. 19, 1996, at D1

Meritor and with SHRM's encouragement, many employers have found that their policies serve the dual purpose of deterring sexual harassment in the work environment and providing legal protection from claims raised by employees who seek judicial relief before giving the employer's internal grievance system a chance to work.[4]

Here, Petitioner proposes a number of rules that would allow employees to bypass internal grievance procedures and nonetheless recover damages. These rules would thereby greatly reduce, if not altogether eliminate, the protection afforded to employers who disseminate and enforce strong anti-harassment policies. At the same time, these rules—by eliminating the duty to exhaust internal procedures—would increase the already over-crowded court docket of employment cases.[5]

Despite the fact that SHRM and the Petitioner share a common goal—to eradicate sexual harassment in the

(Over 70 percent of 300 personnel executives nationwide confirmed that their companies have policies encouraging employees to report issues such as sexual harassment.); Michele Himmelberg, *Sexual Harassment: Has Anything Changed?*, S.F. Examiner, Oct. 15, 1995, at J15 ("Nearly 75 percent of U.S. companies with more than 100 employees had formal policies on sexual harassment in 1994."); Excerpts of EEOC Task Force Report on 'Best' EEO Policies, Programs, Practices in Private Sector, 246 Daily Lab. Rep. (BNA) E-9 (Dec. 23, 1997) (The EEOC has also recently recognized a number of companies for their exemplary compliance efforts, including the establishment of strong anti-harassment policies.).

[4] A June 1994 survey by SHRM, entitled "How Prevalent is Sexual Harassment?", revealed that 96.6% of its members work in organizations that have written policies defining and prohibiting sexual harassment and establishing the manner in which complaints are handled.

[5] Of the civil cases commenced in federal district court in 1997, more employment matters were brought than any other single specifically identified category of cases, comprising almost 9% of the 1997 docket. Administrative Office of the United States Courts, Statistics Division, Judicial Business of the United States Courts, 1997 Report of the Director (unpublished), Table C-2A.

workplace—SHRM firmly believes that employers, rather than courts, are best suited in the first instance to address this issue in an efficient and definitive manner.[6] The courts have echoed this sentiment. For example, the Eleventh Circuit cautioned in *Elrod v. Sears, Roebuck and Co.*, federal courts "do not sit as a super-personnel department that reexamines an entity's business decicions."[7] Similarly, the First Circuit noted in *Keyes v. Secretary of the Navy*, "It is chancy business, indeed, for a court—on so interstitial a matter—to set itself up as a super personnel evaluator . . . ."[8]

Beyond this, the courts have also recognized that internal complaint procedures are to be applauded and warrant the legal protection they offer employers who use them effectively. For example, in *Carmon v. Lubrizol Corp.*,[9] the employer "took the allegations seriously, it conducted prompt and thorough investigations, and it immediately implemented remedial and disciplinary measures based on the results of such investigations. Holding a company such as [this] liable after it has taken such action would produce truly perverse incentives benefitting no one, lease of all actual or potential victims of sexual harassment." Similarly, in *Sims v. Brown & Root Indus. Servs., Inc.*,[10] the court reasoned: "Moreover, it is apparent that [the employer's] sexual harassment policy, which provides a clear avenue for all abused employees by way

[6] The statistical effectiveness of internal complaint procedures was established by the same SHRM survey, *supra*, at n.4. Of the sexual harassment complaints that were reported to the human resources departments, only 22.6% of the respondents reported that those complaints subsequently resulted in a charge being filed with a government agency or court.

[7] 939 F.2d 1466, 1470 (11th Cir. 1991) (citation omitted).

[8] 853 F.2d 1016, 1024-25 (1st Cir. 1988).

[9] 17 F.3d 791, 795-96 (5th Cir. 1994).

[10] 889 F. Supp. 920, 929 (W.D. La. 1995), *aff'd*, 78 F.3d 581 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 68 (1996).

of its Open Door Complaint Policy and hotline telephone number, actually worked in this case and should therefore be praised and celebrated as a model of efficiency."

As previously described, SHRM encourages all its members to adopt and strictly enforce strong policies prohibiting sexual harassment in the workplace and to provide avenues of relief for victims of harassment. For these policies to work, however, participation by employers and employees alike is required. If Petitioner's rules are adopted and thereby send the message to employees that they need not report harassment when avenues are available but may instead seek judicial relief in the first instance, these policies will be ineffective. Moreover, if these policies provide little or no protection from liability to employers, one must ask: Will employers be less inclined to heed the encouragement of SHRM professionals on their staff to adopt and maintain them?

In this brief, SHRM will demonstrate that Petitioner's proposed rules are inconsistent with the well-reasoned decisions of numerous circuit courts and the goal of eradicating sexual harassment through the cooperation of employers and employees, rather than through premature judicial intervention.

SUMMARY OF ARGUMENT

To make it easier to sue, Petitioner proposes three rules that encourage employees to bypass the internal complaint procedures contained in anti-harassment polices. The first is a rule that would effectively impose liability on employers in virtually all situations in which a hostile work environment is created by a supervisor's conduct. Petitioner contends that this rule is reasonable because there is always an implicit threat of retaliation if the employee complains about a supervisor; and, therefore, the harassment is aided by the supervisor's authority. This reasoning, however, ignores the fact that an employer can expressly eliminate any meaningful threat of

retaliation by publishing policies that state that supervisors do not have the power to harass or retaliate against employees and will be terminated for that misconduct.

Second, Petitioner proposes a rule requiring courts to find that an employer has knowledge of harassment if any supervisor receives a complaint. Again, this rule would encourage employees to ignore the internal complaint procedures established by employers because these procedures often designate trained and experienced specific individuals to receive these complaints.

Finally, Petitioner proposes a rule that would require courts to find that an employer has constructive knowledge of any conduct sufficiently pervasive to create an abusive work environment. This proposed rule ignores the fact that even pervasive harassment can go unobserved if it takes place in a remote location, during off-hours or at times when no upper management is present. If employees who work in that environment are not required to make an internal complaint before beginning a lawsuit, who should?

Therefore, SHRM requests that the Court reject each of the three rules proposed by Petitioner and adopt rules that encourage employees to take advantage of the existing avenues of relief provided by employers before seeking judicial relief.

ARGUMENT

POINT I

Employer Liability for a Hostile Work Environment Created by a Supervisor Is Improper if the Supervisor's Conduct Is Expressly Prohibited by a Well-Published Anti-Harassment Policy and the Employer Had No Notice of, or Adequately Responded to, the Supervisor's Conduct.

The first question presented in this case is: Does the threat of retaliation require that an employer be held liable for a hostile work environment created by a super-

visor's conduct—despite the employer's lack of actual or constructive knowledge of the conduct? The starting point for answering this question is this Court's decision in *Meritor, supra,* which rejected a strict liability standard and held that employers are not "always automatically liable for sexual harassment by their supervisors." [11] Instead, courts are to look to agency principles, and determine whether the supervisor was aided in accomplishing the harassment by the existence of the agency relationship.[12]

Petitioner asserts that this determination should be made through the viewpoint of the victim, and suggests that harassment must be deemed to be aided by a supervisor's authority if "the victim reasonably believes that she is at risk of retaliation if she resists, objects to or complains about that harassment." [13] This proposed standard, of course, raises an additional question: When is a victim's purported subjective fear of retaliation objectively reasonable? According to Petitioner this fear is always reasonable because a supervisor's "[o]ngoing control over the subordinate's activities and prospects is a daily reminder of the risks that would be incurred by any objection." [14]

Petitioner suggests that an exception to this principle would arise if the subordinate "knew with certainty that the subordinate had available to her the means to thwart any adverse actions which the supervisor might seek to take." [15] Petitioner's only example of a circumstance fitting this exception is "the happy position of enjoying the immunity from supervisory abuse that is a prerequisite

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[11] *Meritor,* 477 U.S. at 72.

[12] *Id.*; *See generally* Restatement (Second) of Agency § 219-237 (1958).

[13] Petitioner's Br. 21.

[14] Petitioner's Br. 25.

[15] Petitioner's Br. 28.

[sic] of being the boss' daughter." [16] As this circumstance is too rare to be meaningful, Petitioner's viewpoint can be described as a virtually unmitigated belief that a victim's fear of adverse consequences from reporting supervisory harassment is always reasonable.

If Petitioner's reasoning were adopted, employees who bypass internal grievance procedures in favor of seeking judicial relief would be deemed justified, and would be entitled to recover damages, in virtually all instances in which a supervisor engages in sexual harassment. Thus, while Petitioner's path to a strict liability standard is circuitous rather than direct, she nonetheless proposes a strict liability standard for supervisory harassment. This analysis runs afoul of the decision in *Meritor* and, therefore, must be rejected.

A better approach is illustrated in recent court decisions that have focused on the employer's actions, rather than the victim's alleged perception, to determine whether a supervisor has harassed an employee with the aid of his supervisory authority. For example, in *Perry v. Harris Chernin, Inc.*, the employer, a chain of shoe stores, went to great lengths to communicate to its employees that harassment would not be tolerated in the workplace.[17] As SHRM endorses, these efforts included publishing policies prohibiting sexual harassment in the employee handbook, distributing a pamphlet elaborating on the policy, instructing employees to report any unwelcome harassment to one of four corporate officers and addressing harassment in three meetings, including one specifically convened to discuss the issue.[18]

Despite these measures, the plaintiff, a cashier, who alleged in her lawsuit that she was subjected to harassment on a daily basis by the store manager, did not com-

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[16] Petitioner's Br. 29.

[17] 126 F.3d 1010, 1012 (7th Cir. 1997).

[18] *Id.*

plain to the employer until after she quit her job.[19] That complaint prompted an investigation and an invitation to the plaintiff to work at another store during the investigation.[20] The plaintiff declined the invitation and refused to cooperate with the investigation.[21] Instead, she filed suit claiming sexual harassment and constructive discharge.[22]

Pursuant to Petitioner's proposed approach, the plaintiff's failure to complain and refusal to cooperate with the investigation would be justified by her fear and belief that the supervisor's conduct carried an implicit threat of reprisal if she objected. Thus, under a strict liability standard, the employer's exemplary efforts to eradicate harassment in the workplace would not provide it with any legal protection.

The manner in which the Seventh Circuit addressed these facts is more reasonable. Ruling in favor of the employer, the court held that, in these circumstances, imposing an obligation on the employee to complain before seeking damages was not unreasonable.[23] While the harasser did possess supervisory authority over the plaintiff, the employer's policy made it clear that "[i]n the scheme of things, he was a co-worker who was directly answerable to the same people [plaintiff] should have told." [24]

Similarly, in *Torres v. Pisano*,[25] the employer, New York University, promulgated a written sexual harassment

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[19] *Id.* at 1011-12.

[20] *Id.* at 1012.

[21] *Id.*

[22] *Id.* at 1013.

[23] *Id.* at 1014-15.

[24] *Id.* at 1014.

[25] 116 F.3d 625, 628, 636 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 563 (1997).

policy and grievance procedure that was known to the plaintiff, an administrative secretary. Nonetheless, because of her fear of her immediate supervisor, the plaintiff initially chose not to complain.[26] When she finally broke her silence, however, her complaint was investigated, she was offered a transfer to another department and the supervisor was ultimately terminated for his conduct.[27] Despite this response, the plaintiff elected to bring suit against her employer.[28]

Again, under Petitioner's proposed rule of strict liability, the plaintiff's purported fear that her supervisor would retaliate if she reported his conduct would constitute proof that he acted with the aid of supervisory authority. Thus, New York University would be liable despite its policy and its response to plaintiff's complaint.

The court in *Torres* expressly rejected this reasoning, recognizing that it would result in strict liability, and noted that:

> [T]he supervisor is always aided by the employment relationship because the employee will fear the repercussions that might result from her complaining or resisting. But this exception too, if applied in the absence of specific evidence that the supervisor used his authority to place the employee in a position in which she felt that she could not complain without facing adverse consequences, would swallow the rule and negate our holding [rejecting strict liability in supervisor harassment cases].[29]

The "specific evidence" referenced by the Second Circuit is proof that the supervisor expressly invoked his super-

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[26] *Id.* at 628.

[27] *Id.* at 629.

[28] *Id.*

[29] *Id.* at 635.

visory authority when perpetrating the harassment.[30] Absent this evidence, where a low-level supervisor engages in conduct contrary to a written policy that prohibits harassment and provides a procedure to report unwelcome conduct, the employer will not be liable unless it failed to respond adequately after receiving notice of the conduct.[31]

The holdings in *Perry* and *Torres*, as well as the Eleventh Circuit's ruling below,[32] are not only consistent with agency principles, but they also provide employers with an incentive to adopt and enforce strong anti-harassment policies. These cases are also illustrative of common fact patterns and other court decisions.[33] The approach taken by the employers in these cases is endorsed in SHRM's literature and training programs. By contrast, the analysis proposed by Petitioner would have the opposite effect. If employers are subjected to liability despite their efforts to prevent and punish sexual harassment, they could become less motivated to adopt the policies and practices espoused by their human resource professionals and to devote time and financial resources to address this issue. SHRM respectfully asks: Is that what this Court really wants to do? Accordingly, the Petitioner's strict liability analysis should be rejected.

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[30] *Id.*

[31] *Id.* at 634-38.

[32] *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 438 (1997).

[33] *See, e.g., Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 153 (2d Cir. 1997) (prompt and appropriate action in response to harassment complaint barred liability); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 110 (3d Cir. 1994), *reh'g denied*, (Aug. 3, 1994) (employer not liable for supervisor harassment where, in response to complaint, employer took effective action to halt alleged harassment); *Perkins v. General Motors Corp.*, 709 F. Supp. 1487, 1488-98 (W.D. Mo. 1989), *aff'd*, 911 F.2d 22, 27 (8th Cir. 1990), *reh'g denied*, (Aug. 29, 1990, Aug. 31, 1990), *cert. denied*, 499 U.S. 920 (1991) (no liability where, in response to complaint, employer took appropriate corrective action and the harassment ceased immediately).

POINT II

Supervisors Are Not Automatically Agents of the Employer for the Purpose of Receiving and Responding to Harassment Complaints; Complaints to Low-Level Supervisors Not Designated As Agents for This Purpose in an Anti-Harassment Policy Are Insufficient to Charge the Employer With Actual Knowledge of a Hostile Work Environment.

Next, Petitioner's Brief raises the question: When should an employer be charged with actual knowledge of a hostile work environment? In its response, Petitioner urges the Court to adopt a rule that would charge an employer with knowledge if any supervisor is made aware of the hostile environment and has a duty to disclose the information to the employer.[34]

Again, Petitioner proposes a rule that ignores the significance of employer adopted anti-harassment policies, which are encouraged and endorsed by SHRM. Often, employers disseminate policies that designate specific members of management as their agents to receive and act on harassment complaints. In doing so, employers communicate to their employees that they have placed the duty to address workplace harassment in the hands of individuals, rather than the entire supervisory staff. Frequently, these individuals are SHRM members or have been trained by SHRM members regarding topics such as how to recognize sexual harassment, complaint intake procedures, confidentiality protection and effective listening techniques. Non-designated supervisors possess neither actual nor apparent authority to address harassment complaints on the employer's behalf.[35] Nor are they trained to do so.

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[34] Petitioner's Br. 31.

[35] SHRM does not suggest that employers should refrain from training all supervisors to be sensitive to the issue of workplace harassment. Rather, the issue here is whether an employee should be permitted to charge an employer with knowledge of harassment

This point was illustrated in *Baskerville v. Culligan Int'l Co.*[36] There, the employer disseminated an anti-harassment policy that instructed employees to submit complaints to the human resources department.[37] The plaintiff, who admitted that she knew about this policy, nonetheless made her initial harassment complaint to someone outside that department.[38] Several months later, when that supervisor failed to stop the harassment, the plaintiff contacted the human resources department.[39] Thereupon, immediate action was taken and the harassment ceased.[40]

The court found that the employer could not be held liable for its supervisor's failure to correct the alleged harassment because the employee had not followed the proper channels for complaining.[41] In so ruling, the court correctly surmised that: "[h]ad [the plaintiff] complained to the human resources department earlier, as she had been instructed to do, there is no reason to doubt that the 'harassment' . . . would have ceased then."[42]

Particularly in large companies, creating a "chain of communication" for reporting acts of harassment is gen-

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if she complains to a person known to be outside the "chain of communication" created by a well-published anti-harassment policy.

[36] 50 F.3d 428 (7th Cir. 1995).

[37] *Id.* at 432.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*; The same result was reached in *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996), *reh'g denied*, 105 F.3d 673 (11th Cir. 1997). There, the court found that a complaint to an individual who was not a member of "higher management" or a person designated to receive complaints pursuant to the company's anti-harassment policy, did not constitute notice to the company.

[42] Baskerville, 50 F.3d at 432.

erally necessary for an employer to enforce its anti-harassment policy consistently. Moreover, by clearly assigning the responsibility to investigate and redress harassment in the workplace, employers can offer greater confidentiality to employees who submit complaints. It also lessens the likelihood of retaliation when complaints are made in accordance with established procedures that also provide that retaliation is against the law and company policy. (See discussion regarding retaliation, *supra*, at pp. 7-12.)

In retrospect, Petitioner's rule would change the holding of the Seventh Circuit in *Baskerville* (*supra*, at p. 14) and the Eleventh Circuit in *Kilgore* (*supra*, at n.41). It would encourage employees to disregard the procedures contained in anti-harassment policies, often to their own detriment. Therefore, the rule proposed by the Petitioner should not be adopted.

POINT III

Employers Should Not Be Automatically Charged with Constructive Knowledge of Harassment Deemed to Be Sufficiently Pervasive to Create an Abusive Work Environment.

Finally, Petitioner proposes that this Court find that if harassment is sufficiently pervasive to create an abusive work environment, the employer should automatically be charged with constructive notice.[43] Stated another way, Petitioner contends that if employers are not aware that pervasive harassment is taking place, they should be deemed negligent and charged with knowledge.

In reality, however, even pervasive harassment can go undetected. For example, in *Pfau v. Reed*,[44] the plaintiff presented sufficient facts to support a claim that she was

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[43] Petitioner's Br. 34-35.

[44] 125 F.3d 927, 939 (5th Cir. 1997).

subjected to conduct that created an abusive work environment. This evidence notwithstanding, the court found that the harassment was not so open and obvious to support a finding that the employer should have known it was taking place.[45] In so ruling, the court noted:

> This conclusion is bolstered by the fact that much of the alleged conduct took place outside the working environment and the affidavits offered by [the plaintiff] contain little indication that any substantial portion of the alleged sexual harassment took place in the presence of other employees.[46]

Similarly, in *E.E.O.C. v. Domino's Pizza, Inc.*,[47] the plaintiff was subjected to continual acts of harassment by his supervisor during a five month period. The court found that this conduct was sufficiently pervasive to create a hostile environment, but nevertheless declined to charge the employer with constructive knowledge, noting that "no one from [employer's] management was there to observe [the supervisor's] conduct." [48]

Likewise, in *Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*,[49] the plaintiffs alleged that, over a period of several months, they were subjected to unwelcome conduct by the store manager, the highest ranked supervisor at a remote location in Oswego, New York. Though the district court concluded that the alleged harassment was sufficiently pervasive to subject the plaintiffs to a hostile work environment, it declined to impose liability on the company for the store manager's conduct prior to the date on which the plaintiffs submitted their complaints pursuant

[45] *Id.*

[46] *Id.*

[47] 909 F. Supp. 1529, 1533 (M.D. Fla. 1995), *aff'd*, 113 F.3d 1249 (11th Cir. 1997), *cert. denied*, 1998 WL 6440 (1998).

[48] *Id.* at 1535.

[49] 957 F.2d 59, 61 (2d Cir. 1992).

to the company's grievance procedure.[50] The Second Circuit agreed, and held that "the district court could reasonably have found that the company, whose main office was in Rochester, did not have constructive notice of [the store manager's] behavior in Oswego." [51]

SHRM does not suggest that the pervasiveness of harassment is irrelevant to the determination of whether an employer should be charged with constructive knowledge. Rather, as the Eleventh Circuit recognized below, pervasiveness is one of many facts that should be considered in making this determination.[52] The other facts that the court found determinative included the location and time of the harassment, the employer's opportunity to observe the conduct and form of the harassment.[53]

If, instead, knowledge of pervasive harassment is automatically charged to employers, employees will have little incentive to report this conduct. Under Petitioner's rule, when an employee is faced with pervasive harassment in the workplace, that employee could go straight to court and seek a remedy, rather than allowing the employer's internal grievance procedure to work. This result must be avoided; and rules should be adopted that, instead, encourage employees to come forward and give the employer an opportunity to provide a remedy.

[50] *Id.* at 61-62.

[51] *Id.* at 64.

[52] *Faragher*, 111 F.3d at 1538.

[53] *Id.* at 1538-39.

CONCLUSION

For all the foregoing reasons, SHRM respectfully requests that this Court affirm the Eleventh Circuit's *en banc* ruling and support rules that encourage both employers and employees to establish and utilize internal policies against harassment.

Respectfully submitted,

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APPENDIX

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SAMPLE POLICY STATEMENT CONCERNING NON-DISCRIMINATION AND HARASSMENT

The XYZ Company is committed to a work environment in which all individuals are treated with respect and dignity. Each individual has the right to work in a professional atmosphere that promotes equal employment opportunities and prohibits discriminatory practices, including harassment. Therefore, XYZ expects that all relationships among persons in the office will be business-like and free of bias, prejudice and harassment.

Equal Employment Opportunity

It is the policy of XYZ to ensure equal employment opportunity without discrimination or harassment on the basis of race, color, religion, sex, sexual orientation, age, disability, marital status, citizenship or any other characteristic protected by law. XYZ prohibits any such discrimination or harassment.

Retaliation Is Also Prohibited

XYZ encourages reporting of all perceived incidents of discrimination or harassment. It is the policy of XYZ to investigate such reports. XYZ prohibits retaliation against any individual who reports discrimination or harassment or participates in an investigation of such reports.

Definitions of Harassment

i. *Sexual harassment* constitutes discrimination and is illegal under federal, state and local laws. For the purposes of this policy, sexual harassment is defined, as in the Equal Employment Opportunity Commission Guidelines, as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when, for example: (1) submission to such conduct is made either explicitly

or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Sexual harassment may include a range of subtle and not so subtle behaviors and may involve individuals of the same or different gender. Depending on the circumstances, these behaviors may include, but are not limited to: unwanted sexual advances or requests for sexual favors; sexual jokes and innuendo; verbal abuse of a sexual nature; commentary about an individual's body, sexual prowess or sexual deficiencies; leering, whistling or touching; insulting or obscene comments or gestures; display in the workplace of sexually suggestive objects or pictures; and other physical, verbal or visual conduct of a sexual nature.

ii. *Harassment on the basis of any other protected characteristic* is also strictly prohibited. Under this policy, harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, sex, sexual orientation, national origin, age, disability, marital status, citizenship or any other characteristic protected by law or that of his/her relatives, friends or associates, and that: (i) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (ii) has the purpose or effect of unreasonably interfering with an individual's work performance; or (iii) otherwise adversely affects an individual's employment opportunities.

Harassing conduct includes, but is not limited to: epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; denigrating jokes; and written

or graphic material that denigrates or shows hostility or aversion toward an individual or group and that is placed on walls or elsewhere on the employer's premises or circulated in the workplace.

Individuals and Conduct Covered

These policies apply to all applicants and employees, whether related to conduct engaged in by fellow employees or someone not directly connected to XYZ (*e.g.*, an outside vendor, consultant or customer).

Conduct prohibited by these policies is unacceptable in the workplace and in any work-related setting outside the workplace, such as during business trips, business meetings and business-related social events.

Reporting an Incident of Harassment, Discrimination or Retaliation

XYZ encourages reporting of all perceived incidents of discrimination, harassment or retaliation, regardless of the offender's identity or position. Individuals who believe that they have been the victim of such conduct should discuss their concerns with their immediate supervisor, any member of the Personnel Practices Committee, the Director of Human Resources or any ombudsman. See the Complaint Procedure described below.

In addition, XYZ encourages individuals who believe they are being subjected to such conduct promptly to advise the offender that his or her behavior is unwelcome and request that it be discontinued. Often this action alone will resolve the problem. XYZ recognizes, however, that an individual may prefer to pursue the matter through informal or formal complaint procedures.

Complaint Procedure

Informal Procedure

If for any reason an individual does not wish to address the offender directly, or if such action does not successfully end the offensive conduct, the individual should notify his/her immediate supervisor, the Director of Human Resources, a member of XYZ's Personnel Practices Committee or any ombudsman, who may, if the individual so requests, talk to the alleged offender on the individual's behalf. In addition, there may be instances in which an individual seeks only to discuss matters with one of the XYZ designated representatives, and such discussion is encouraged.

An individual reporting harassment, discrimination or retaliation should be aware, however, that XYZ may decide it is necessary to take action to address such conduct beyond an informal discussion. This decision will be discussed with the individual. The best course of action in any case will depend on many factors and, therefore, the informal procedure will remain flexible. Moreover, the informal procedure is not a required first step for the reporting individual.

Formal Procedure

As noted above, individuals who believe they have been the victims of conduct prohibited by this policy statement or believe they have witnessed such conduct should discuss their concerns with the Director of Human Resources, any member of the Personnel Practices Committee or any ombudsman.

XYZ encourages the prompt reporting of complaints or concerns so that rapid and constructive action can be taken before relationships become irreparably strained. Therefore, while no fixed reporting period has been established, early reporting and intervention have proven to be the most effective method of resolving actual or perceived incidents of harassment.

Any reported allegations of harassment, discrimination or retaliation will be investigated promptly. The investigation may include individual interviews with the parties involved and, where necessary, with individuals who may have observed the alleged conduct or may have other relevant knowledge.

Confidentiality will be maintained throughout the investigatory process to the extent consistent with adequate investigation and appropriate corrective action.

Retaliation against an individual for reporting harassment or discrimination or for participating in an investigation of a claim of harassment or discrimination is a serious violation of this policy and, like harassment or discrimination itself, will be subject to disciplinary action. Acts of retaliation should be reported immediately and will be promptly investigated and addressed.

Misconduct constituting harassment, discrimination or retaliation will be dealt with appropriately. Responsive action may include, for example, training, referral to counseling and/or disciplinary action such as warning, reprimand, withholding of a promotion or pay increase, reassignment, temporary suspension without pay or termination, as XYZ believes appropriate under the circumstances.

If a party to a complaint does not agree with its resolution, that party may appeal to XYZ's Executive Director or the Chief Operating Officer.

False and malicious complaints of harassment, discrimination or retaliation as opposed to complaints which, even if erroneous, are made in good faith, may be the subject of appropriate disciplinary action.

Conclusion

XYZ has developed this policy to ensure that all its employees can work in an environment free from harassment, discrimination and retaliation. XYZ will make

every reasonable effort to ensure that all concerned are familiar with these policies and aware that any complaint in violation of such policies will be investigated and resolved appropriately.

Any employee who has any questions or concerns about these policies should talk with the Director of Human Resources or a member of the Personnel Practices Committee.

Finally, these policies should not, and may not, be used as a basis for excluding or separating individuals of a particular gender, or any other protected characteristic, from participating in business or work-related social activities or discussions. In other words, no one should make the mistake of engaging in discrimination or exclusion in order to avoid allegations of harassment. The law and the policies of XYZ prohibit disparate treatment on the basis of sex or any other protected characteristic, with regard to terms, conditions, privileges and perquisites of employment. The prohibitions against harassment, discrimination and retaliation are intended to complement and further those policies, not to form the basis of an exception to them.